UTRA BADI K PERUMAL

v.

LEMBAGA TATATERTIB PERKHIDMATAN AWAM, HOSPITAL BESAR PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG
VINCENT NG J
[CIVIL SUIT NO: 22-322-91]
30 MAY 1996

CIVIL PROCEDURE: *Declaration - Right - Whether plaintiff had right to be heard - Whether dismissal was void for want of opportunity to mitigate*

ADMINISTRATIVE LAW: *Judicial review - Whether limited to review of decision-making process - Whether court may review decision*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Domestic tribunal - Whether decision to dismiss plaintiff a quasi-judicial function - Whether decision to reject representations of plaintiff to exculpate himself an exercise of quasi-judicial function*

ADMINISTRATIVE LAW: *Public servants - Declaration that dismissal of plaintiff was void - Whether plaintiff should be given opportunity to be heard - Whether plaintiff should have opportunity to mitigate before punishment - Regulation 27 of Public Officers Regulations 1969 - Article 135(2) of Federal Constitution*

The plaintiff was a hospital assistant in the Penang General Hospital. On 31 January 1991 he was asked to show cause why disciplinary action should not be taken against him on the ground that he was a drug addict. The plaintiff wrote to the 1st defendant giving his explanation but was dismissed from service as from 20 March 1991. He appealed to the Appeal Board of Public Service but his appeal was rejected. The plaintiff thus sought to move the court for a declaration by way of invoking the court's power of judicial review. It was contended that the 1st defendant, a decision maker, had failed to give the plaintiff, whose interest would be adversely affected by the decision to dismiss him, an opportunity to be heard on the issue of punishment. It was submitted that the right to mitigate is an implied requirement under art. 135(2) of the Federal Constitution ('the FC') and in reg. 27 of the Public Officers Regulations 1969 ('the Regulations'). It was further contended that as the penalty/punishment was expressed in equivocal terms, the plaintiff should not have been dismissed or reduced in rank unless he had been afforded a

reasonable opportunity to mitigate. It was urged upon the court that such a drastic measure which involved the loss of the plaintiff's very livelihood ought in fairness to require that he be given the opportunity to make a plea in mitigation for the lighter of the two alternative punishments stated in the charge.

Held:

[1] It is unjust to deny a civil servant the opportunity to be heard in mitigation before punishment is imposed on him, as the punishment itself involves a further decision-making process. Expressed alternative punishments are merely suggested punishments and hence hypothetical, until a definite conclusion has been arrived at on the charges, and the actual punishment to follow is provisionally determined. It is on that stage being reached that the statute gives the civil servant the opportunity to represent against the punishment proposed as a result of the enquiry.

[2] The extreme punishment of dismissal from service severely affects the civil servant's future, in terms of livelihood and his family's loss of his financial support; and to him it is the loss of the ultimate stake in his future, unlike a reduction in rank. Thus, when the board decided to dismiss the plaintiff, a decision-making process was undertaken; and the decision to dismiss him was done as much in the process of exercising a quasi-judicial function as the decision to reject his written representations to exculpate himself on the show cause notice.

[2a] The right of the plaintiff to be heard in mitigation is implicitly encompassed in O. 23 of the Public Officers General Orders 1980 ('the POGO') and in art. 135(2) of the FC. He had to be heard throughout the proceedings from the beginning to the end. As the 1st defendant had not given the plaintiff any opportunity to be heard in mitigation before punishment, the decision making process pertaining thereto was fatally flawed.

[3] The scope of judical review is limited only to a review of the decision making process and **not** the decision itself. In the instant case, it was plainly beyond the ambit of a judicial review for the court to touch on the decision itself and consider whether if the plaintiff was rightly found to be a drug addict he could be allowed to continue to work in an institution such as a hospital. It was equally untenable for the court to decide whether the lesser of the two alternatives ought to have been imposed.

[3a] Due to the non-compliance of O. 23 of the POGO and of art. 135(2) of the FC in the manner in which the 1st defendant had made its decision on the punishment imposed, the termination of the plaintiff's services had been rendered nugatory, null and void and of no effect. In the circumstances, the plaintiff was still a hospital assistant and was entitled to all his salaries and benefits due to him as such. The parties were to determine the plaintiff's salaries and other emoluments due to him failing which an enquiry would be held by the Senior Assistant Registrar of the court to determine those issues.

Obiter dicta

[1] It is clear that O. 35(1) of the POGO is only applicable in the context of O. 33 of the POGO which deals with an officer where criminal proceedings against him results in his conviction and also O. 34(1) of the POGO which concerns the procedure in the case of preventive detention and banishment. In the context of criminal proceedings, reg. 28 of the Regulations defines the term 'convicted' or 'conviction' to include a finding or an order involving a finding of guilt in a criminal court. Hence O. 35(1) of the POGO which allows a disciplinary authority to 'forthwith inflict upon the officer such lesser punishment' of 'dismissal' or 'reduction in rank' or 'deal with him in such manner as it may deem fit', is manifestly and plainly intended by the Legislature to be invoked only where the servant's case falls strictly within the ambit of proviso (a) of art. 135(2) of the FC or O. 34(1) of the POGO and not otherwise. This is logically so as in the first place, such civil servant who is caught within proviso (a) of art. 135(2) of the FC is expressly barred by the supreme law of the land from the right to be heard or an opportunity to show cause before being removed or reduced in rank.

[2] Proviso (a) of art. 135(2) of the FC precludes the invocation of art. 135(2) of the FC not only by a civil servant who has been convicted of a criminal charge, but also by such employee who is bound over under s. 173A(2)(b) of the Criminal Procedure Code with no conviction recorded.

[Plaintiff's claim allowed with costs.]

Cases referred to:

Alan Noor bin Kamat [1987] 1 CLJ 51 ***(refd)***

Asriyah Sairy v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor (Civil Appeal No: 01-41-94) ***(refd)***

Bachittar Singh v. State of Punjab & Anor AIR [1963] SC 395 (V 50C 49) ***(cit)***

C Apparao v. The Deputy Inspector-General of Police, Northern Range, Waltair & Anor AIR [1958] Andhra Pradesh 269 (V 45 C 75) ***(cit)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125 ***(cit)***

Ganesh Balakrishna Deshmukh v. State of Madhya Bharat [1956] Madya Bharat 172 (AIR V 43 C 72) ***(cit)***

Gangadhar Gurusiddappa v. Union of India AIR [1963] Mysore 193 (V 50 C 44) ***(cit)***

Halimatussaadiah v. Public Service Commission [1992] 1 MLJ 52 ***(cit)***

Hiro Lilaram Chablani v. State of Hyderabad (S) AIR [1955] Hyderabad 48 (Vol 42 CN 13) ***(cit)***

Hjh Halimatus Saadiah v. Public Service Commission [1993] 3 CLJ 532 ***(cit)***

Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64 ***(cit)***

Re Pergamon Press Ltd [1970] 3 All ER 535 ***(cit)***

Pancha Moorthy Suppaya v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor (Civil Appeal No: 01-40-94) ***(refd)***

Public Prosecutor v. Lee Eng Kooi [1993] 2 CLJ 534 ***(cit)***

Shamsiah bte Ahmad Sham v. Public Services Commission [1991] 1 CLJ 23 ***(refd)***

Sher Singh, Malhan, Petitioner v. State Madhya Pradesh, Respondent (S) AIR [1955] Nagpur 175 (Vol 42 CN 40) ***(refd)***

Shri Sitaram Sugar Co Ltd v. Union of India & Ors [1990] 3 SCC 223 ***(cit)***

Smt Maneka Gandhi v. Union of India AIR [1978] SC 597 ***(cit)***

Sobhagmal v. State, AIR 1954 Rajastan 207 (Vol 41 CN 64) ***(cit)***

State of Bihar v. Abdul Majid AIR [1953] SC 245 (V 41) ***(cit)***

State of Bombay v. Amarsinh Raval AIR [1963] Gujarat 244 (V 50 C 59) ***(cit)***

Syed Mahadzir b Syed Abdullah v. Ketua Polis Negara & Anor [1994] 3 CLJ 245 ***(refd)***

Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(cit)***

The High Commissioner of India v. IM Lall AIR (35) [1948] PC 121 ***(refd)***

Tribhuwan Nath Pandey v. Union of India AIR [1953] Nagpur 138 (B) ***(cit)***

Tropiland v. Majlis Perbandaran Seberang Prai [1996] 3 CLJ 837 ***(cit)***

Vasant Pandurang Deval v. The State of Bombay AIR [1963] Bombay 269 (V 50 C 60) ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 107(1), 173A(2)(b)
Dangerous Drugs (Special Preventive Measures) Act 1985, s. 11C
Evidence Act 1950, ss. 91, 92
Federal Constitution, arts. 5(1), 8(1), 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 23, O. 26(5), O. 33, O. 34(1), O. 35(1), O. 36
Public Officers (Conduct and Discipline) General Orders (Chapter D) Regulations 1969, regs. 27, 28

For the plaintiff - Karpal Singh (Jagdeep Singh with him); M/s Karpal Singh & Co
For the defendants - Syed Marzidy Syed Marzuki FC

[Editor's note: For a recent authority on judicial review and the dismissal and punishment of public servants, please see also the Federal Court's decision in Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405; [1997] CLJ JT(19).]

Reported by Michele Saw

JUDGMENT

Vincent Ng J:

The plaintiff was at all material times a hospital attendant in the General Hospital Penang and was an employee of the 2nd defendant.

In this case, he is suing the defendants for the following reliefs:

A declaration that the purported dismissal of the plaintiff as hospital attendant Tingkatan Biasa in the General Hospital, Penang is null and void and of no effect and that the plaintiff is still a hospital attendant Tingkatan Biasa entitled to all the salaries and benefits due to him;

An inquiry to determine the salaries, emoluments and other benefits due to the plaintiff; interest and costs.

By a letter dated 31 January 1991, the plaintiff was asked to show cause why disciplinary action should not be taken against him on the grounds that he was a drug addict as the sample of urine taken from him was tested positive on 5 May 1990 for morphine. The letter (marked DP10) is set out in full as follows:

> Bahawa satu lapuran telah diterima oleh Lembaga Tatatertib yang menyatakan bahawa tuan/Encik Utra Badi a/l K. Perumal, Atendan Hospital T. Biasa di Hospital Besar, Pulau Pinang telah berkelakuan yang melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap tuan.

2. Lembaga Tatatertib, setelah menimbangkan segala maklumat yang diterima, berpendapat bahawa tuan patut dikenakan tindakan tatatertib dengan tujuan buang kerja atau turun pangkat di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 atas pertuduhan-pertuduhan berikut:

Bahawa tuan, Encik Utra Badi a/l K. Perumal, semasa bertugas sebagai Atendan Hospital T. Biasa di Hospital Besar, Pulau Pinang dalam satu ujian air kencing tuan secara mengejut pada 5hb. Mei 1990 telah disahkan sebagai penagih dadah kerana ujian contoh air kencing yang diambil didapati positif mengandungi morfin. Perbuatan tuan menjadi seorang penagih dadah adalah merupakan satu perbuatan yang boleh menjatuhkan reputasi Perkhidmatan Awam dan adalah melanggar tatakelakuan di bawah Perintah Am 4(2)(d) dalam Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980.

Jika tuan didapati bersalah, tuan boleh dihukum mengikut Perintah Am 36 dalam Perintah-Perintah Am yang sama.

3. Mengikut Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 tuan adalah diminta membuat satu representasi secara bertulis yang mengandungi alasan-alasan yang tuan hendak gunakan untuk tuan membebaskan diri tuan. Representasi tersebut hendaklah dikemukakan kepada Lembaga Tatatertib Perkhidmatan Awam, melalui Ketua Jabatan tuan dalam tempoh 14 hari daripada tarikh tuan menerima surat ini. Sekiranya tuan tidak membuat representasi tersebut dalam tempoh masa yang ditetapkan itu tuan akan dianggap sebagai tidak hendak membela diri dan perkara ini akan diputuskan oleh Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar, Pulau Pinang berdasarkan keterangan-keterangan yang sediada sahaja.

The plaintiff was given 14 days to reply from the date of receipt of the said letter.

On 7 February 1991, the plaintiff by a letter of even date (marked DP12) wrote to the 1st defendant giving his explanation on the charge proffered against him as follows:

Merujuk surat tuan Bil: Rujukan (5) dlm. HB/PP/PER/TT/1240 (SULIT) bertarikh 31hb. Januari 1991 telah selamat di terima dan diucapkan terima kasih.

Untuk makluman tuan bahawa **saya bukanlah seorang penagih dadah** sepertimana yang dinyatakan didalam surat tuan. Saya sekali lagi merayu diatas jasa baik tuan untuk bersimpati dengan rayuan saya yang hina ini **untuk menjalankan ujian air kencing sekali lagi** diatas diri saya. Ujian air kencing yang dibuat pada 5hb. Mei 1990 adalah besar kemungkinan satu kesilapan teknik telah berlaku. Mungkin air kencing itu bukanlah air kencing saya.

Untuk makluman tuan bahawa pekerja-pekerja di Hospital Besar, Pulau Pinang sangat mengetahui di atas kelakuan saya dan saya bukanlah seorang penagih dadah. Begitu juga dengan kaum keluarga saya, semuanya sangat mengetahui bahawa saya bukan seorang penagih dadah. Saya sangat benci pada dadah dan tidak pernah melibatkan diri dengan penagih dadah.

Saya tidak berhasrat untuk merosakan rekod perkhidmatan saya selama 27 tahun dengan Kerajaan dan tidak pernah dikenakan sebarang tindakan tatatertib oleh Jabatan.

Kerjasama tuan diatas rayuan saya ini sangat-sangatlah diharapkan dan disanjung tinggi dan diatas rayuan saya ini untuk menjalankan ujian air kencing sekali lagi akan mendapat persetujuan dan pertimbangan yang sewajarnya daripada tuan.

About one month later, on 20 March 1991, the Pengerusi, Lembaga Tatatertib Perkhidmatan Awam Kumpulan D Pulau Pinang forwarded to the plaintiff a letter (marked DP13) dismissing him from service w.e.f. 20 March 1991, which reads as follows:

Lembaga Tatatertib di dalam mesyuarat yang ke 2/1991 pada 20hb. Mac 1991 setelah menimbangkan dengan teliti pertuduhan ke atas tuan dan **jawapan yang diberi oleh tuan serta maklumat-maklumat lain yang berkaitan,** memutuskan bahawa tuan dikenakan hukuman buang kerja mulai 20hb. Mac 1991 mengikut Perintah Am 36(i) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.

2. Mengikut Peraturan 12(1) dan 13(1) Peraturan-Peraturan Lembaga Tatatertib Perkhidmatan Awam 1972 (P.U.(A) 48), (Pindaan) 1979 tuan adalah dengan ini diberi peluang untuk membuat rayuan kepada Lembaga Rayuan Tatatertib melalui Ketua Jabatan tuan di dalam tempoh 14 hari mulai dari tarikh penerimaan surat keputusan Lembaga Tatatertib ini.

Soon after receipt of DP13 the plaintiff by his letter dated 26 March 1991 (marked DP14) wrote an appeal to the Lembaga Rayuan Tatatertib Perkhidmatan Awam, Kumpulan "D". He set out in detail his grounds in the following terms:

Atendan Hospital,
Hospital Besar,
Pulau Pinang.
26hb Mac, 1991.

Pengerusi,
Lembaga Rayuan Tatatertib Perkhidmatan Awam,
Kumpulan 'D',
Jabatan Perkhidmatan Awam,
Pulau Pinang.
Melalui: Saluran-saluran tertentu:-

Tuan,

Per: Rayuan terhadap keputusan Lembaga Tatatertib pada 20hb. Mac, 1991 yang mengenakan hukuman Buang Kerja.

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Saya dengan hormatnya merujuk kepada surat tuan bil. (13) dlm. HB/PP/PET/TT/1240 (SULIT) bertarikh 20hb Mac, 1991 dan ingin merayu terhadap keputusan tersebut atas alasan-alasan yang berikut:-

a) Dalam mencapai keputusan ini pihak Lembaga tidak mengambil kira akan alasan-alasan yang telah saya berikan ke atas tuduhan yang dibuat terhadap saya dan dengan itu keputusan itu adalah dibuat secara terburu-buru dan tanpa sebab-sebab yang berasas;

b) Saya telah mengemukakan pembelaan yang kuat terhadap tuduhan ke atas diri saya mengenai ujian air kencing di mana bukti-bukti bertulis mengenai ubat yang dimakan oleh saya pada ketika itu telah pun dibuktikan;

c) Ujian air kencing secara mengejut yang dijalankan pada 7.5.1990 tidak dilakukan dengan sempurna dan ia menimbulkan keraguan samaada:

   i) Air kencing saya telah diperiksa atas nama saya atau

   ii) Air kencing orang lain telah diuji atas nama saya.

d) Semasa ujian air kencing dijalankan saya hanya diberi sebuah botol yang kosong tanpa sebarang lebel padanya dan dengan itu ada kemungkinan besar air kencing saya diuji atas nama orang lain dan air kencing orang lain diuji atas nama saya.

e) Kemungkinan yang lebih besar yang membawa kesan dadah dalam air kencing saya ialah bahawa pada ketika itu saya telah makan/minum 'Linctus Codeine' kerana sakit batuk;

f) Lapuran ujian air kencing ini telah diberitahu saya pada 24.9.90 iaitu lebih kurang 4½ bulan selepas ujian air kencing dibuat. Tetapi jika keputusan ujian itu dikeluarkan dengan segera maka saya mungkin telah membuat satu lagi ujian melalui seorang doktor atau ahli kimia yang lain dan dengan itu ujian mengejut yang dijalankan oleh pihak hospital dapat dicabar;

g) Saya tidak diberi peluang langsung untuk mencabar atau membela diri ke atas ujian air kencing yang dijalankan oleh pihak hospital; oleh itu keraguan adalah ditimbulkan samaada ujian itu dikendalikan dengan sempurna.

h) Untuk menentukan seorang yang terlibat dengan dadah memerlukan banyak ujian dan ianya tidak boleh ditentukan dengan satu ujian air kencing secara mengejut; tambahan pula dalam kes ini, seperti yang tersebut di atas, ada kemungkinan mendapat kesan dadah akibat saya memakan ubat pada ketika itu.

i) Lembaga Tatatertib tidak memberi pertimbangan yang wajar terhadap banyak keraguan yang timbul dari hasil ujian air kencing yang mengejut ini dan dengan itu keputusan yang dibuat terhadap saya adalah tidak adil;

j) Saya mempunyai rekod perkhidmatan yang bersih selama 27 tahun dan pegawai-pegawai atasan saya yang pernah saya bertugas dengan mereka telah memberi pengesahan bertulis bahawa saya bukanlah seorang yang terlibat dengan dadah dan bahawa saya adalah orang yang berkelakuan baik;

k) Hukuman pembuangan kerja adalah suatu hukuman yang sangat berat dan muktamad. Oleh itu tuduhan terhadap seseorang pekerja itu hendaklah terbukti tanpa sebarang keraguan walau sedikit sekalipun. Jika terdapat atau timbulnya sedikit keraguan sekalipun ke atas bukti tuduhan itu maka faedah keraguan itu haruslah diberi kepada orang yang kena tuduh itu.

Oleh yang demikian, memandangkan terlalu banyak keraguan yang telah timbul terhadap tuduhan ke atas diri saya dalam kes ini maka saya merayu supaya hukuman yang dikenakan terhadap saya dibatalkan atau dikaji semula kerana sekali lagi saya ingin menegaskan bahawa saya bukanlah seorang pengagih dadah atau orang yang terlibat dengan dadah.

Sekian, terimakasih.

Saya yang menurut perintah,

t.t.
(Utara Badi a/l Perumal)

The plaintiff's appeal was rejected *vide* a letter from Suruhanjaya Perkhidmatan Awam Malaysia Kuala Lumpur (marked DP17) which states thus:

> Saya diarah menarik perhatian kepada surat tuan terhadap keputusan Lembaga Tatatertib Kumpulan 'D' Hospital Besar, Pulau Pinang yang telah mengenakan hukuman buang kerja ke atas tuan.
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> 2. Lembaga Rayuan Tatatertib (Kumpulan 'D') dalam mesyuaratnya yang ke-526 pada 17 Jun 1991 setelah menimbangkan dengan teliti rayuan tuan itu, telah memutuskan bahawa hujah-hujah yang dikemukakan bagi menyokong rayuan tuan itu tidak dapat diterima sebagai boleh mengubah keputusan Lembaga Tatatertib yang telah menjatuhkan hukuman buang kerja ke atas tuan. Dengan hal yang demikian Lembaga Rayuan mengambil keputusan menolak rayuan tuan.
>
> 3. Keputusan Lembaga Rayuan Tatatertib ini adalah muktamad.

The plaintiff sought to move the Court for a declaration by way of invoking this court's power of judicial review. This law is now well settled, and pointedly so, when on 8 May 1996 the Federal Court held, in Civil Appeal No. 01-41-94 *(Asriyah bte Sairy v. 1. Suruhanjaya Perkhidmatan Awam, Malaysia 2. Kerajaan Malaysia)* and Federal Court Civil Appeal No. 01-40-94 *(Pancha Moorthy a/l Suppaya v. l. Suruhanjaya Perkhidmatan Awam, Malaysia 2. Kerajaan Malaysia)* that there can be declarations made in relation to unlawful dismissal of a government servant. See also *Halimatussaadiah v. Public Service Commission* [1992] 1 MLJ 52 as confirmed by the Supreme Court in *Hajjah Halimatu Saadiah v. Public Service Commission* [1994] 3 MLJ 61 and *Syed Mahadzir b. Syed Abdullah v. Ketua Polis Negara and Anor* [1994] 3 MLJ 391 which was also affirmed on appeal to the Federal Court; in both the cases, declarations were sought for wrongful dismissal of a Government servant.

The plaintiff, through his solicitor, Mr Karpal Singh, raised only three issues. Firstly, he contended that the wording in DP10 (show cause letter) which contained two alternative punishments under General Order 26 (or indeed, more than two punishments under General Order 36) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, has nullified the charge itself for want of clarity. He contended that the 1st defendant should only have stated which of the alternative punishments they intended to use against him, to enable the plaintiff to be prepared for the serious consequences of the charge and be better able to direct his mind to the possibility of such a punishment; it being obvious that dismissal from the service is the most severe punishment that can be imposed upon a civil servant found guilty of misconduct.

With respect, I find this objection untenable as, essentially, it pertains to the penalty rather than the charge being equivocal and I do not see how it could affect the validity of the charge. There is nothing wrong with the way the charge is worded in DP10 considering that it is in exact compliance with General Order 26 and it contained all the necessary particulars to enable the plaintiff to prepare his written representation in answer thereto. In my view, the charge was properly drafted with enough particulars rendered, to enable the plaintiff to respond to the allegations made and for the purpose of exculpating himself, though an outline of the charge would usually suffice. See *Re Pergamon Press Ltd.* [1970] 3 All ER 535.

The second issue was that the 1st defendant had taken into account other material information which had never been put to the plaintiff. He contended that this must have happened, in view of the expression in DP13: "setelah menimbangkan dengan teliti pertuduhan ke atas tuan dan jawapan yang diberi oleh tuan **serta maklumat-maklumat lain yang berkaitan**" (emphasis added). This would mean that other matters extraneous to the charge itself, which were never made available to the plaintiff, appeared to have been taken into consideration by the Board, without any opportunity accorded to the plaintiff to make his representation on those extraneous matters. In essence, the complaint is that the plaintiff was not given a reasonable opportunity to be heard on the other relevant information that appeared to have been considered in the decision making process which led to his dismissal from service.

In *Shamsiah bte Ahmad Sham v. Public Services Commission* [1990] 3 MLJ 364, the employer had taken into account the employee's record of past conduct without giving her an opportunity to explain or controvert its contents. Jemuri Serjan SCJ (as he then was) delivering the judgment of the Supreme Court, allowing the appeal had this to say:

> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it.

On this issue, reverting to the current matter, the defence called Encik Karnail Singh a/l L. Sohan Singh (DW1), who was at the material time the Deputy Medical Superintendent of Penang General Hospital and also a member of the Disciplinary Board. He explained that by the expression "maklumat-maklumat lain yang berkaitan" in the 1st paragraph of DP13 the Board had meant and intended to refer to the contents in paras. 2, 3 and 4 of the plaintiff's reply to DP12. He further said that the Board did not take into account any other information but only the result of the urine test. He was positive that, that was the only reason for the plaintiff's dismissal. And, he acknowledged that there was no oral enquiry, as all representations were made in writing, and that the plaintiff was not given an opportunity to mitigate before imposition of punishment. It is noted that Mr Karpal had in this regard, quite correctly conceded that DP13 is not caught within s. 91 and 92 of the Evidence Act since it was not a document that was required to be reduced into writing under the General Orders.

Thus, after having carefully studied and considered the evidence of DW1, I am satisfied that the defendants have given a full, adequate and acceptable explanation as to what that impugned phrase in DP13 meant, and I accept DW1's assertion that there were no extraneous matters considered by the Board other than the fact that plaintiff's urine was tested positive for morphine. I am also minded to accept DW1's explanation that the other relevant information ("maklumat-maklumat lain yang berkaitan") referred to was what plaintiff had written in his letter of representation (DP12) and nothing more. In the event, the plaintiff's second challenge on the Board's procedure does not commend itself to me, and is, as with the first point, devoid of any merit.

It is however, the third and last point taken by Mr Karpal Singh, which I must now turn to, that has engendered in me some considerable interest, and I am sure, the interest of our superior courts hereafter. This issue poses the question: Whether a civil servant is clothed with any right to an opportunity to mitigate before punishment, especially in cases where two or more punishments are held out to him as alternative or possible punishments?

The plaintiff complains that the 1st defendant – a decision maker – has failed to give the plaintiff, whose interest will be **adversely affected** by the decision to dismiss him, an opportunity to be heard on the issue of punishment. It is submitted that this right to mitigate is also an implied requirement under art. 135(2) of the Federal Constitution which found expression and affirmation through incorporation in O. 23 of the Public Officers (Conduct and Discipline) (Chapterd "D") General Orders 1980 (General Orders), reg. 27 of the Public Officers (Conduct and Discipline) General Orders (Chapter D) Regulations

1969 (Regulations). Mr Karpal Singh contends that, as the penalty/punishment was expressed in equivocal terms, the plaintiff should not be dismissed or reduced in rank unless he has been afforded a reasonable opportunity to mitigate. The plaintiff was informed in DP13 that he had been dismissed. It was thus urged upon this Court that such a drastic measure which involved loss of the plaintiff's very livelihood ought, in fairness, to require that he be given the opportunity to make a plea in mitigation for the lighter of the two alternative punishments stated in the charge. My attention was drawn to art. 135(2) of the Federal Constitution, which states:

> No member of such a service (public service) as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

On the question of the possible punishments, Mr Karpal, had also made heavy weather of the last sentence in para. 2 of DP10 which reads: "Jika tuan didapati bersalah, tuan boleh dihukum mengikut Perintah Am 36 dalam Perintah-Perintah Am yang sama", and General Order 36 sets out nine (9) possible punishments. Though, I am inclined to agree with Mr. Karpal's contention that DP10 is the type of document which the law requires to be reduced to writing, in which case, s. 91 and 92 of the Evidence Act 1950 is applicable to preclude the defendant from contradicting, varying, adding to or subtracting from its terms. In support of this contention, counsel cited my decision in *PP v. Lee Eng Kooi* [1993] 2 CLJ 534 – pertaining to a similar issue of the police report which was required under s. 107(1) of the Criminal Procedure Code to be reduced to writing – which has been upheld by the Federal Court under Criminal Appeal No. 05-63-93. However, I find, and I am fully satisfied that the language "dengan tujuan buang kerja atau turun pangkat di bawah Perintah Am 26" appearing in the first sentence of the same paragraph of DP10 would have the net effect of sufficiently clarifying the last sentence of DP10, as, the impugned phrase has essentially to be read in the context of the clear expression in the first sentence of the same paragraph in the same document. Be that as it may, yet it is nevertheless beyond question that at least two alternative, and in that sense, equivocal punishments have been held out to him. This being the case, Mr. Karpal's third contention calls for this court's careful deliberation.

As far back as in 1987, Ajaib Singh J in the case of *Alan Noor bin Kamat* [1987] l CLJ 51 had this to say:

> After considering these explanations and having found that the plaintiff had failed to exculpate himself it was incumbent upon the IGP thereafter to give the plaintiff an opportunity to make a plea in mitigation on the punishment. The right of the plaintiff to be heard in mitigation is implied in reg. 27 of the

> General Orders and in art. 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?

However, Ajaib Singh J decision in *Alan Noor* went up on appeal to the Supreme Court, but though the appeal was dismissed, Salleh Abas LP made certain obiter comments which are somewhat at variance with the dicta of Ajaib Singh J in the court below. This is what the Lord President had to say:

> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as "This proceeding is taken against you with a view to dismissal or reduction in rank ..." or "This proceeding is taken under General Order 30 with a view to dismissal or reduction in rank ...", or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.

The above dicta of Salleh Abas LP is clearly obiter and for reasons below, I am, with respect, not persuaded to adopt it.

Even at first blush, it had struck me as some what unjust to deny the plaintiff here an opportunity to mitigate where it involves alternative punishments, before penalty is imposed *a la* in criminal jurisprudence, as:

(a) the two alternative punishments notified to the plaintiff were tentative, drastically distinct in effect, one from the other, and dis-tinctly equivocal in nature.

(b) the heavier of the two alternative punishments is severely penal in nature.

(c) the very question of which one of the two alternative punishments to mete out to the plaintiff would itself essentially entail a deliberative decision making process on the part of the defendant Board.

Unlike some other jurisdictions, both India and Malaysia are each governed by a written Constitution. It is noteworthy, that the exercise of termination of employment of a government servant in India is subject to the provisions of art. 311 of the Indian Constitution which is equivalent to our art. 135(2).

There is a striking similarity in the language employed, by the formulators of the two Constitutions, in art. 135(2) (hereafter referred as art. 135(2)) of the Federal Constitution and art. 311(2) (hereafter referred as art. 311(2)) of the Indian Constitution. Article 135(2) reads as follows:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the grounds of conduct in respect of which a **Criminal charge has been proved against him;**

And art. 311(2) reads:

> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that this clause shall not apply:

> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led **to his conviction on a criminal charge;**

Though proviso (a) of our art. 135(2) is wholly irrelevant to the current discussions, yet it is nevertheless of interest to note that it has been held by our Court of Appeal that this Proviso (a) precludes invocation of art. 135(2) not only by a civil servant who has been convicted of a criminal charge, but also, by such employee who is bound over under s. 173A(ii)(b) with no conviction recorded. See *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

It would follow that the decisions of the Indian Courts upon such analogous provision are to be accorded greater weight and regarded as of great persuasive force in our decisions here. It is pertinent to note that Part IV of the All India Services (Disciplinary and Appeal) Rules 1969 (which deals with the procedure for disciplinary action against Indian civil servants) require the holding of an inquiry, unlike our General Orders which, in Part II (in the case of dismissal or reduction in rank) provide for only a show cause letter and written

representations; albeit, with provision for the Disciplinary Authority to appoint a committee of inquiry (under O. 26(5)), but even then, if further clarification is necessary. Yet, despite the fact that holding of an inquiry is mandatory in India, it has been consistently held in a copious and welter of Indian cases, (which followed the Privy Council decision in *The High Commissioner of India v. I.M. Lall* AIR (35) [1948] PC 121), that it is manifest in art. 311 that a civil servant has a right to a reasonable opportunity of showing cause twice before an order of dismissal is imposed. These two stages under art. 311 are: firstly, when the charges are enquired into, and secondly, when after the enquiring authority has come to the conclusion that the charge or charges has been established and there arises the question of the proper punishment to be imposed, a notice has then to be given to show cause against the nature of punishment to be imposed; see *Sher Singh, Malhan, Petitioner v. State Madhya Pradesh, Respondent (S)* AIR 1955 Nagpur 175 (Vol. 42 CN 40.)

The ratio in *Sher Singh (supra)* has been faithfully echoed in similar vein in the following other Indian cases:

i) *Tribhuwan Nath Pandey v. Union of India* AIR 1953 Nagpur 138 (B).

ii) *Sobhagmal v. State,* AIR 1954 Rajastan 207 (Vol. 41 CN 64)

iii) *Hiro Lilaram Chablani v. State of Hyderabad (S)* AIR [1955] Hyderabad 48 (Vol. 42, CN 13)

iv) *Ganesh Balakrishna Deshmukh v. State of Madhya Bharat, 1956 Madhya Bharat* 172 (AIR V 43 C 72)

v) *C. Apparao v. The Deputy Inspector-General of Police, Northern Range, Waltair and Another* AIR 1958 Andhra Pradesh 269 (V 45 C 75).

vi) *Bachhittar Singh v. State of Punjab and Another* AIR 1963 Supreme Court 395 (V 50 C 49).

vii) *State of Bombay v. Amarsinh Raval* AIR 963 Gujarat 244 (V 50 C 59).

viii) *State of Bihar v. Abdul Majid* AIR 1953 SC 245 (V 41).

ix) *Vasant Pandurang Deval v. The State of Bombay* AIR 1963 Bombay 269 (V 50 C 60).

x) *Gangadhar Gurusiddappa v. Union of India* AIR [1963] Mysore 193 (V 50 C 44).

xi) *The High Commissioner of India v. I.M. Lall* AIR (35) [1948] Privy Council 121.

I have earlier expressed a tentative opinion that it would be unjust to deny the civil servant an opportunity to be heard in mitigation before punishment is imposed on him, as the punishment itself involves a further decision-making process. Now, upon careful reading of the speech of Lord Thankerton, delivered on behalf of the Privy Council in *I.M. Lall (supra)* I find eminently persuasive and authoritative dicta to fortify that opinion. The reason being also that the expressed alternative punishments are merely suggested punishments, and hence hypothetical, until a definite decision has been come to on the charges. I need do no more in this regard than to quote the relevant passage in Lord Thankerton's speech, which was logically and aptly articulated thusly:

> In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punshment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant opportunity for which sub-s. (8) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under r. 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry.

Pertaining to the right to mitigate I have not overlooked the language used in General Order 35(1), which, if read in isolation, may appear to militate against the plaintiff's case, as being in effect a denial of the right to mitigate. It reads:

> Notwithstanding anything in General Order 23, if after considering the report and documents submitted by the Head of Department General Order 33 and 34(1), the **Appropriate Disciplinary Authority is of the opinion** that the officer merits dismissal or reduction in rank, **it may forthwith direct** acordingly; **or if it is of the opinion** that the officer should be inflicted with a lesser punishment or otherwise dealt with, the Disciplinary Authority **may forthwith inflict** upon the officer such lesser punishment or deal with him in such a manner as it may deem fit.

However, it is crystal clear that General Order 35(1) is only applicable in the context of General Order 33 (which deals with an officer where criminal proceedings against him results in his conviction) and also General Order 34 (1) (which concerns procedure in the case of preventive detention and banishment). And, in the context of criminal proceedings, be it noted that reg. 28 defines the term "convicted" or "conviction" to include a finding or an order involving a finding of guilt in a criminal court. Hence General Order 35(1), which allows a Disciplinary Authority to "forthwith inflict upon the officer such lesser punishment" of "dismissal" or "reduction in rank" or "deal with him in such manner as it may deem fit"– thereby implying that the civil servant is not clothed with any right to mitigate on the punishment – is manifestly and plainly intended by the legislature to be invoked only where the servant's case falls strictly within the ambit of the proviso (a) of art. 135(2) or General Order 34(1) and not otherwise. This is logically so, as in the first place, such civil servant who is caught within proviso (a) of art. 135(2) is expressly barred by the supreme law of the land from the right to be heard or an opportunity to show cause before being removed or reduced in rank. Here, it is crucial to note that it has never been the defendants' contention that the plaintiff is caught within proviso (a) of art. 135(2).

It ought to be borne in mind that unlike a reduction in rank, the extreme punishment of dismissal from service severely affects the civil servant's future, in terms of loss of livehood and his family's loss of his financial support; to him it is loss of the ultimate stake in his future. Thus, I hold that when the Board decided to dismiss the plaintiff, a decision making process was undertaken; and the decision to dismiss him was done as much in the process of exercising a quasi-judicial function as the decision to reject his written representations to exculpate himself on the show cause notice.

If art. 135(2) is read in conjunction with art. 5(1) and 8(1) of the Federal Constitution, it cannot be denied that procedural fairness in dealing with matters affecting the citizens is also part of our law, as the word "law" in both Articles encompasses both substantive law and enacted procedure. See *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, *Dewan Undangan Negeri Kelantan & Anor v. Nordin b. Salleh & Anor* [1992] 1 MLJ 697, *Smt Maneka Gandhi v. Union of India* AIR 1978 SC 597 and *Shri Sitaram Sugar Co. Ltd v. Union of India & Ors* [1990] 3 SCC 223. See also *Tan Tek Seng (supra)*, in which this point was extensively discussed by Gopal Sri Ram JCA, delivering the majority judgment of the Court of Appeal. As this nation moves towards a modern society, governed by just and justiciable laws, firmly and fairly enforced, with its executive actions avowed to be anchored upon the principles of transparency and accountability, it is inevitable that an increasingly more

liberal and purposeful approach would have to be taken by the courts, in interpreting the rights of the citizenry, in the light of and to implement the true brooding spirit of the framers of the Federal Constitution.

It is thus my considered decision that the right of the plaintiff to be heard in mitigation is implicitly encompassed in O. 23 of the General Order and in art. 135(2) of the Federal Constitution, unless proviso (a) thereof is applicable (not the case here). He has to be heard throughout the proceedings from the beginning to the end. And, with respect, I agree with the dicta encapsulated in the rhetorical question posed by Ajaib Singh J in the case of *Alan Noor (supra):* Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?" Consequently, in my judgment, as it is common ground that the first defendant had not given the plaintiff any opportunity to be heard in mitigation before punishment, the decision making process pertaining thereto is fatally flawed.

As I have held that the plaintiff is entitled to succeed due to procedural error on the part of the first defendant which has seriously prejudiced the rights of the plaintiff, I shall now finally turn to consider the nature of relief or order that is open for this court to make.

It is trite law, in our as well as other Commonwealth jurisdictions, that the scope of judicial review is limited only to review of the decision-making process and not the decision itself. (See *Tropiland v. Majlis Perbandaran Seberang Prai* [1996] 4 MLJ 16.) It is in the vital interest of the citizenry that the powers of the court on judicial review ought, in a democracy, essentially to be preserved if only to check and curb the occasional excesses or capriciousness of the executive and public administrative bodies. Indeed, if we are to maintain the essential basic principles governing a democracy, it becomes the bounden duty of the courts to intercede in favour of the citizen when such lapses are manifest (as happened in *Tropiland v. Majlis Perbandaran Seberang Prai (supra)*). The courts have thus jealously and vigilantly guarded its powers of judicial review. It must be borne in mind that the courts have often exercised its powers of judicial review in the teeth of ouster of jurisdiction provisions in certain statutes eg, for Writ of *habeas corpus* despite s. 11C of the Dangerous Drugs (Special Preventive Measures) Act 1985. In judicial review the Court does not sit as an appellate body and has no appellate power to exercise. So, quite rightly, in its vigilance to protect and most importantly, to preserve such powers the courts have been consistenly averse to review or interfere with the decision *per se* of the executive or public administrator in such cases.

Thus, in the instant case before me, it is plainly beyond the ambit of a judicial review for this court to touch on the decision itself and consider whether, if the plaintiff was rightly found to be a drug addict he could be allowed to continue to work in an institution such as a hospital. Though, even on this score it may also be noted that the plaintiff had in para. (c) of DP14, asserted that the urine tested was not his urine as he had not taken prohibited drugs but only cough mixture. And, it is equally untenable for me here to decide whether the lesser of the two alternative penalties ought to have been imposed, as this point was not taken by either party, and quite apart from the fact that such deliberation is precluded by the lack of any printed or oral evidence on (nor do I see) to what lower rank a hospital attendant – such as the plaintiff – could be reduced.

Obviously, for the current purposes, what has to be decided – within this court's purview – is, and I so hold that, due to non-compliance of O. 23 of the General Orders and of art. 135(2) of the Federal Constitution in the manner in which the first defendant had made their decision on the punishment imposed, the termination of the plaintiff's services had been rendered nugatory, null and void and of no effect.

In the circumstances therefore I allow the plaintiff's claim with costs and declare that the punishments imposed on him are null and void and of no effect. I further declare that the plaintiff is still a Hospital Attendant and is entitled to all his salaries and benefits due to him as such. The parties are to determine the plaintiff's salaries and other emoluments due to him failing which an inquiry will be held by the Senior Assistant Registrar of this court to determine these issues.

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